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OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

DEC 29 1987

Jacqueline Young, Esq.
N.L.R.B. Professional Association
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Dear Ms. Young:

This letter is in response to your letters dated October 15 and October 26, 1987 to the Office of Personnel Management concerning the establishment of a dependent care assistance program, as described in Section 129 of the Internal Revenue Code of 1986, at the National Labor Relations Board. Your letters have been referred to this office for a response.

Section 129 does not define the term "employer" in a manner which would preclude the Federal government, or any Federal agency, from establishing a dependent care assistance program. However, section 129 does not prescribe any particular manner in which a dependent care assistance program must be financed. The manner of financing suggested in your letter of October 15 would permit the employee to designate a portion of the employee's salary for dependent care payments. A plan providing for such an election, between cash and a nontaxable fringe benefit, is a "cafeteria plan" described in section 125.

The salaries of Federal employees are set by statute under Title 5 of the United States Code. The Internal Revenue Service does not have the authority to approve that a portion of those salaries may be used to provide benefits within the meaning of section 125 and section 129 in the manner that you have described. The Office of Personnel Management has regulatory authority for Title 5 and has indicated that the only comparable provisions in Title 5 permitting the contribution of a portion of an employee's basic pay to a fund established for the employee's subsequent benefit is the Federal Employees' Thrift Savings Plan. In the opinion of that Office, the specific statutory authority establishing the Thrift Savings Fund could in no way be read as authorizing the Federal government to establish the cafeteria plan permitted under section 125. 5 U.S.C. 8431 et seq and 5 U.S.C. 8471 et seq.

You indicated in your letter of October 26 that there may be some interest in sponsoring legislation relating to dependent care assistance plans financed by salary reduction for the

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Federal government. We do not believe it is necessary to amend section 125 and section 129 in connection with this proposed legislation.

As requested by the Office of Personnel Management, we are forwarding a copy of this letter to that office. If you have any questions concerning this matter please contact Monice Rosenbaum, an attorney in the Employee Benefits and Exempt Organizations Division of the Office of the Chief Counsel, Internal Revenue Service at 566-3422.

Sincerely,

(signed) James J. McGovern

James J. McGovern
Director
Employee Plans and Exempt
Organizations Division

cc: Wade Plunkett, Office of Personnel Management

United States of America
**Office of
Personnel Management**

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To

Your Reference

DEC 8 1987

William F. Nelson
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue
Washington, D.C. 20224

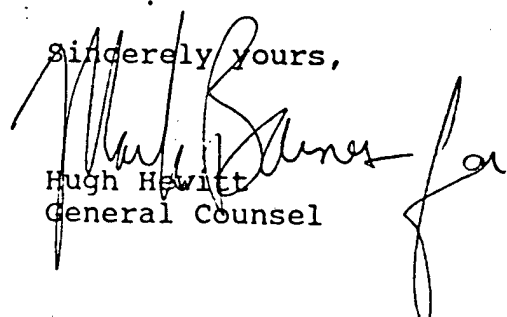
Dear Mr. Nelson:

We have recently received an inquiry from Ms. Jacqueline Young, an attorney with the National Labor Relations Board, concerning the establishment, under the provisions of the Internal Revenue Code, of a dependent care assistance program at NLRB. Ms. Monice Rosenbaum, of your office, has suggested we refer Ms. Young's letter to you for a definitive opinion on this matter, to which Ms. Young has agreed.

We wish to point out that nothing under Title 5, United States Code authorizes establishing a dependent care assistance program. The only comparable provisions in Title 5 permitting the contribution of a portion of an employee's basic pay to a fund established for the employee's subsequent benefit is the Federal Employee's Thrift Savings Plan under 5 U.S.C. 8431 et seq., and 5 U.S.C. 8471 et seq. The specific statutory authority establishing the Thrift Savings Fund could in no way be read as authorizing in the Federal government, the "cafeteria plan" permitted under the Internal Revenue Code in the private sector.

The question of whether the Federal government, or any Federal agency, as an employer, may establish a dependent care assistance program unilaterally without specific legislative authority is one best answered by the IRS. We therefore refer the attached letter to you for direct reply to Ms. Young. If you will, please forward a copy of your reply to OPM to the attention of Wade Plunkett, an attorney in this office.

Sincerely yours,


Hugh Hewitt
General Counsel